

**STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)**

BEFORE THE CHIEF PROCUREMENT OFFICER

In the Matter of Protest of:)

DECISION

CASE No. 2009 - 129

Green's Travel Coach)

Francis Marion University)

BVB No. BVB-2022)

Transportation for Athletic Teams)

POSTING DATE:

September 8, 2009

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Green's Travel Coach (Green's). With this best value bid (BVB), Francis Marion University (FMU) attempts to procure motor coach transportation services for its athletic teams. In the letter, Green's protested FMU's intent to award to Lancaster Tours (Lancaster) alleging "our bid was the lowest bid" and "I was told (by FMU) that Lancaster was a larger company that could provide more coaches and more drivers."

In order to resolve the matter, the CPO conducted a hearing August 27, 2009. Appearing before the CPO were Green's, represented by Antonio and Lavender Green; Lancaster, represented by Frankie Sistare; and FMU, represented by Velma Simmons, Director of Purchasing.

NATURE OF PROTEST

The letter of protest is attached and incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On July 20, 2009, FMU issued the BVB. [Ex. 1]
2. On August 3, 2009, FMU opened the following bids:

<u>Bidder</u>	<u>Bid Amount</u>
Green's	\$61,096
Lancaster	81,512
Travel Tours Unlimited [Ex. 9]	91,307

3. On August 4, 2009, FMU posted a notice of intent to award to Lancaster "Not to exceed \$250,000."
[Ex. 4]
4. On August 10, 2009, Green's protested to the CPO.

DETERMINATION

FMU processed the procurement as a best value bid. The Consolidated procurement Code authorizes the use of a best value bid. Its reads:

(1) Conditions for Use. When a purchasing agency determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State, a contract may be entered into by competitive best value bidding subject to the provisions of Section 11-35-1520 and the ensuing regulations, unless otherwise provided for in this section.

(2) Best Value Bidding. The purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific supplies, services, or information technology based on pre-determined criteria identified by the State. [11-35-1528]

FMU completed the required written determination justifying the use of a best value bid.

Velma Simmons wrote:

In selecting a contractor to provide transportation for the Athletic Department, it has been determined that factors other than price such as company capabilities and demonstrated abilities are critical to the award.

Factors of this nature can best be expressed and evaluated through the use of competitive best value bidding. The services to be provided may be bid by companies not having adequate resources to provide them. Safety is also of primary importance. A low bid solicitation would not be an effective method to determine which vendor is acceptable. It is felt that 40% evaluated criteria is sufficient and RFP would not be necessary. [Ex. 2]

The CPO finds that FMU's written determination for using a best value bid fails to meet the statutory requirement. In addition, FMU's primary concern – the low bidder may not have adequate resources to perform the transportation services – could have just as easily been accomplished through a thorough determination of responsibility by FMU prior to award.

The CPO finds numerous statutory violations in the determination of award by FMU.

FMU requested fax or email bids in violation of 11-35-1520 that requires sealed bidding for all solicitations greater than \$50,000

The evaluation criteria is poorly defined and spread across the length of the BVB, not located in one clearly delineated section of the BVB, as follows:

- “the university has established that quality of fleet and available resources are critical factors in award” [Ex. 1, p. 2, Scope of Solicitation]
- “PRICING IS VALUED AT 60% OF AWARD.” [Ex. 1, p. 5, Requirement] [Emphasis theirs]
- Best Value Bid Award Criteria
 - Give a brief overview of your company, date of incorporation, and number of employees at the facility that would service this account.
 - Please break out that number by function (i.e. drivers, mechanics, administrative, support personnel).
 - List the number of 42 passenger buses in your fleet that would be available to service this contract and the date of their manufacture.

- List your USDOT certification number.
- List the number of full time vs. part time drivers you employ.
- Submit any other information that you believe would demonstrate that your company would be the best choice to provide this service to the university.
- YOUR RESPONSES TO THE QUESTIONS ABOVE WILL BE EVALUATED BY UNIVERSITY PERSONNEL AS 40% OF THE AWARD CRITERIA.
- [Ex. 1, p. 6]

The evaluation criteria do not announce the weight (importance) of each evaluation factor in accordance with 11-35-1528(5), which reads, “The best value bid must state the factors to be used in determination of award and the numerical weighting for each factor.” Price was weighted at 60%, as required by law, but rather than announce the weight of each of the remaining evaluation criterion, FMU lumped them together as 40% of the award, in violation of the Code, which reads, “The best value bid must state the factors to be used in determination of award and the numerical weighting for each factor.” [11-35-1528] [Emphasis mine]

Rather than scoring proposals on a 100 point numerical basis, as has been the practice in South Carolina state government for decades, and in conformance with the evaluation criteria, the evaluators merely ranked the offers 1-3 with no apparent consideration for the stated importance of each evaluation criterion. [Ex. 8] The Code allows ranking of a best value bid, but requires that a ranking must follow evaluation of the award criteria. It reads, “Bids shall be evaluated by using only the criteria stated in the best value bid and by adhering to the weighting as assigned. All evaluation factors, other than cost, will be considered prior to determining the effect of cost on the score for each participating bidder. Once the evaluation is complete, all responsive bidders shall be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the

best value bid.” [11-35-1528(7)] [Emphasis mine] FMU skipped the evaluation and went straight to the ranking in violation of law.

The evaluation was not conducted in accordance with the announced weighting of the evaluation criteria as stated in the BVB in violation of SC Code section 11-35-1528, which reads: “Bids shall be evaluated by using only the criteria stated in the best value bid and by adhering to the weighting as assigned. All evaluation factors, other than cost, will be considered prior to determining the effect of cost on the score for each participating bidder. Once the evaluation is complete, all responsive bidders shall be ranked from most advantageous to least advantageous to the State, considering only the evaluation factors stated in the best value bid.” Clearly, FMU did not consider the weight assigned the evaluation factors, particularly price, in its ranking of bidders. Instead, there is no evidence that the evaluators considered price at all.

The ranking completed by FMU completely ignored the stated evaluation criteria and the weight assigned each criterion. Instead, they chose the bidder they liked best.

After the protest was filed, not before award, FMU fabricated evaluation score sheets in the conventional fashion utilized by the state.¹ The scores were as follows:

<u>Offeror</u>	<u>Evaluator</u>	<u>Score</u>
○ Green’s	Michael	88
	○ Murray	88
	○ Velma	<u>84</u>
● Total		<u>260</u>
○ Lancaster	Michael	92
	○ Murray	92

¹ Velma Simmons acknowledged during the hearing that the evaluation score sheets were not prepared until after the protest was filed.

- Velma 92
- Total 276
- [Ex. 5]

- Scores for price were proportioned mathematically as follows:

- Green's 60 per evaluator
- Lancaster 52 per evaluator

An analysis of the prices offered by Green's and Lancaster reveals that even in the score sheets fabricated after the protest was filed, the mathematical apportionment of points for cost was made erroneously. The correct scores for cost should have been as follows:

- Green's \$61,096 60 per evaluator
- Lancaster \$82,512 44 per evaluator ($\$61,096/\$82,512 = 74\%$,
60 points x 74% = 44.4)

- The correct scores should have been:

- Offeror Evaluator Score

- Green's Michael 88
- Murray 88
- Velma 84

- Total 260

- Lancaster Michael 84.4 (44.4 + 24)
- Murray 84.4 (44.4 + 40)
- Velma 84.4 (44.4 + 40)

- Total 253.2

- As the highest scoring offeror, Green's should have won!

No written determination and finding of award was prepared in violation of SC Code section 11-35-1528, which reads, "Award must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the State, taking into consideration all evaluation factors set forth in the best value bid. The contract file shall contain the basis on which the award is made and must be sufficient to satisfy external audit." According to Ms. Simmons, the determination of award offered as Ex. 5 was not prepared until after the protest was filed.

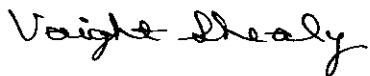
FMU felt that Green's was nonresponsive in that Green's did provide the required information regarding its number of drivers and buses. The Code defines a bidder's conformance with the requirements of a solicitation as responsiveness, which means "a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals." [11-35-1410(7)] She noted that Green's wrote in its bid, that it possessed five buses and wrote "Our buses feature 20 air ride." [Ex. 11, p. 3, Equipment] Green's testified that the statement "20 air ride" refers to the suspension of its buses, not their capacity. Without seeking a clarification of Green's statement, FMU considered Green's nonresponsive. However, FMU evaluated Green's bid and no determination or memo for the file was prepared to document any deficiencies in Green's bid.

According to Murray Hartzler, FMU's Director of Athletics, FMU has experienced some poor performance from transportation providers in the past from bidders who claimed to possess the resources to provide the transportation services, but failed in the performance of the contract. FMU expressed the opinion that Green's did not possess sufficient drivers, staff and motor coaches to perform the contract. However, FMU did not seek any additional information from Green's or complete a determination of non-responsibility, as required by SC Code 11-35-1810(2), which reads "A written determination of non-responsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the board."

The CPO is sympathetic to FMU's plight in the past and to its desire to contract with a provider with adequate resources to perform the contract, but notes that the solicitation requires the contractor to provide buses capable of "transporting a minimum of 42 passengers" [Ex. 1, p. 5, IV. Requirements, Item 3] to transport FMU sports teams on 35 trips. However, all but 10 of those trips only require a single bus; the other 10 trips require two buses. According to Antonio Green, Green's possesses one 47 passenger bus, three 56 passenger buses, and one 25 passenger bus. The Code defines a responsible bidder as, "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." [11-35-1410(6)] As the BVB requires that the buses be at least 42 passenger, the 25 passenger bus cannot be considered, but on the surface, Green's four buses capable of transporting at least 42 people would seem sufficient.

FMU issued an intent to award for "not to exceed \$250,000", but Lancaster's bid was only \$82,512. Who knows where the estimate of \$250,000 was derived? For an award of \$82,512, the Code does not even require the issuance of an intent to award; a statement of award would have sufficed. Yet, FMU issued an intent to award.

For all the reasons stated above, the protest is granted. The award to Lancaster is vacated. The procurement is remanded back to FMU for a proper determination of award, or better, a resolicitation.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

September 8, 2009

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2009-2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 23, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).